IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISIDICTION

NOTICE OF MOTION NO.40 OF 2003
WITH
NOTICE OF MOTION NO.2329 OF 2003
IN
SUIT NO.34 OF 2003

Hetero International .. Plaintiffs

Vs.

Shandong Medicines & Health Products
Imp and Exp Corp.& Ors. .. Defendants

Mr.Milind Vasudeo a/w Mr.O.Mohandas i/b M & M Legal Venture for the plaintiffs

Mr.Simil Purohit i/b Wadia Gandhy and Co. for the defendants

CORAM: S.U.KAMDAR, J
DATE : 27TH OCTOBER, 2005

ORAL JUDGMENT:

1. By these two notice of motions, the plaintiffs are seeking an injunction restraining the defendant no.2 from in any manner whatsoever making payment to the defendant no.3 and further restraining defendant no.3 from making any payment to the defendant no.1 under an Letter of Credit issued by the defendant no.2. Further order is also sought restraining defendant no.2 from debiting the account of the plaintiffs in respect

of the amount covered by the said Letter of Credit. By Notice of Motion No.2329 of 2003 further interim reliefs are sought that the Letter of Credit opened by the plaintiffs with the defendant no.2 should be discharged and further restraining defendant no.2 from debiting the plaintiff account @ sum of Rs.7000/- per month or any other charges towards the said Letter of Credit. By prayer clause (c) of the said notice of motion, plaintiffs are seeking to lift the lien and release the fixed deposit of Rs.47,61,771.41 which has been imposed for due discharge of amount covered by the Letter of Credit. Some of the material facts of the present case can be briefly enumerated as under:

2. It is the case of the plaintiffs that the plaintiffs are a firm inter alia carrying on business of import and export of bulk drugs and life saving pharmaceuticals. It is further case of the plaintiffs that plaintiffs desired to import life saving drugs for the patient suffering from AIDS and for the aforesaid purpose placed an indent dt.5.11.02 with the defendant no.1 company which is incorporated and registered in Republic of China.

Under the said indent, plaintiffs placed an order on defendant no.1 for the supply of 590 kgs. of bulk drugs known as Beta Thymidine Min.99%. The price agreed in respect of the said goods were US $ 151 per kg CIF. For the purpose of import of the said goods plaintiffs opened Letter of Credit in favour of defendant no.1 through the defendant no.2. Date of shipment provided under the said indent was 20.11.02 and the date for negotiation under Letter of Credit was 5.12.02.

3. In pursuance of the said indent plaintiffs applied on 7.11.02 to the defendant no.2 for opening of an Irrevocable Letter of Credit in sum of USD 89,090 favouring defendant no.1. One of the terms and conditions of the said Letter of Credit was that the documents are to be presented alongwith the said Letter of Credit. Defendant no.2 for the purpose of establishing the said Letter of Credit insisted upon a lien in respect of Fixed Deposit account and plaintiffs agreed to create such a lien in respect of fixed deposit account to the extent of Letter of Credit amount with the defendant no.2. Ultimately, on 11.11.02

defendant no.2 opened a Letter of Credit in accordance with the instructions given by the plaintiffs in favour of defendant no.1. The said Letter of Credit was issued through the defendant no.3 namely Bank of China. On 12.11.02, defendant no.2 requested for amendment of Letter of Credit and by the said amendment it has been provided that Beneficiary Certificate be added certifying that the material complies to the specification and results of the certificate of Batch NO.200112016 of the Rich Fine Chemical Co.Ltd and Batch No.0603 of Shanghai Manufacturers Standard, China. The said certificates must be forwarded alongwith Letter of Credit. A further amendment of Letter of Credit was sought by the plaintiffs on 16.11.02 extending the date of shipment to 10.12.02 and the date of expiry to 25.12.02. On 12.12.2002 plaintiffs received a notice of the arrival of Cargo under the Airway Bill No.618-314651416 from the defendant no.1. On 13.12.02 plaintiffs requested defendant no.2 to issue a delivery order in favour of the plaintiffs since the Cargo had arrived at Sahar Airport. On 13.12.2002 plaintiffs also issued an undertaking interalia providing therein that they

authorised the bank to accept on their behalf the documents negotiated under the captioned Letter of Credit and to effect payment thereunder to the beneficiary on the due date. An undertaking also specifies that the plaintiffs undertake unconditionally to take delivery of and accepted such document irrespective of any discrepancies therein. The said clause (A) of the letter dt.13.12.2002 reads as under:

> "A) We hereby authorize you to accept on our behalf, the documents negotiated under the captioned letter of credit and to effect payment thereunder to the beneficiary on due date and we hereby unconditionally undertake to take delivery of and to accept such documents irrespective of any discrepancies therein."

4. Accordingly on 13.12.02 the defendant no.2 issued a said order in terms of the request made by the plaintiffs. Plaintiff thereafter filed a Bill of Entry for Home Consumption for clearance of the said goods and took delivery thereof on 16.12.02. The Cargo was received by the plaintiffs on 17.12.02. It is the case of the plaintiffs that on 19.12.02 when the plaintiffs inspected the said

goods on delivery and the Analysis Report certifying that the goods are of a particular quality they found that the goods were sub standard and not inconfirmity with the specifications of the indent. The Analysis Report of Virdev Intermediates P.Ltd has been relied upon by the plaintiffs in support of the aforesaid contention. It is the case of the plaintiffs that on 25.12.02 plaintiffs informed defendant no.1 that the goods received by them did not match with the specifications and that the goods were of sub standard quality and could not be used for manufacture of final products. Plaintiffs also called upon the defendant no.1 to replace the entire consignment free of cost and extend the payment validity.

5. On 21.12.02 defendant no.2 addressed the letter to the plaintiffs that they have received the entire set of documents which shall be delivered against payment. It is the case of the plaintiffs that however, the said documents which are received by the defendant no.2 bank only on 22.12.02 contained certain discrepancies and thus

they were not liable to make payment and / or retire the documents. In para 13A of the plaint, plaintiffs has set out various discrepancies which are there according to them in the Letter of Credit and thus, it is the case of the plaintiffs that the plaintiffs are not liable to make payment under the said Letter of Credit. However, since the defendant no.2 insisted on the payment of the said amount covered by the Letter of Credit plaintiffs have filed the present suit interalia seeking a relief that it should be declared that the documents forwarded by the defendant no.1 under Letter of Credit contain certain material discrepancies and a fraud has been committed by defendant no.1 on the plaintiffs and therefore they are not liable to pay. By amendment to the plaint it has also been prayed that defendant no.2 is not liable to make payment because defendant no.2 rejected the documents since it contained certain discrepancies.

6. On the aforesaid averments, the present suit is filed and motion was taken out being motion no.40 of 2003. On 30.12.02 an ad interim order has

been passed in Notice of Motion No.40 of 2003 in terms of prayer clause (a) and (b) giving an injunction restraining defendant no.2 from making any payment under the said Letter of Credit and or from debiting the account of the plaintiffs. The matter was thereafter came up after notice on 7.1.03 and onceagain an ad interim order was continued. Ultimately by further two orders dt.21.1.03 and 26.2.03. the said order was continued and in so far as goods are concerned Commissioner was appointed by order dt.30.12.02 and Commissioner has inspected the said goods. The possession of the said goods has been taken by the Commissioner and has put the seal thereon. It seems that thereafter the defendant no.2 was debiting the account of the plaintiffs @ 7000 p.m. for keeping the said Letter of Credit alive and continued the lien on the account covered by the said Fixed Deposit for 110% margin. Thus, the plaintiffs took out second Notice of Motion being Motion No.2329 of 2003 restraining the defendants from debiting the account of the plaintiffs @ 7000 p.m. and / or lift the lien on the said fixed deposit. The said notice of motion was heard by

the learned single Judge on 8.9.03. On 8.9.03 the learned Judge, F.I.Rebello has refused to grant any ad interim order and motion has been placed for hearing together with Motion No.40 of 2003. Accordingly I have heard the aforesaid Notice of Motion.

7. The learned counsel for plaintiffs has strenuously contended that the ad interim order be granted in Notice of Motion No.40 of 2003 restraining defendant no.2 from making payment on the Letter of Credit and that defendant no.2 be restrained from making payment in the said Letter of Credit to defendant no.3 and/or defendant no.1. It has also been contended that Motion No.2329 of 2003 also should be made absolute and defendant no.2 should be restrained from debiting the account of the plaintiffs for the sum of Rs.7,000/- p.m. towards keeping the said Letter of Credit alive as also restrained from continuing the lien on the fixed deposit.

8. The learned counsel for plaintiffs has urged that the aforesaid relief should be granted

to the plaintiffs on two grounds. Firstly, it has been contended that there has been fraud committed by defendant no.1 in as much as while supplying the drugs indented for which were life saving drugs for HIV AIDS patients a sub standard quality of the drugs are supplied by the defendant no.1. It has been further urged that utilisation of such drugs by the plaintiffs would have had a disastrous effect on the public at large. Thus, it has been contended that due to fraud being committed by defendant no.1 in supplying the sub-standard goods and not in accordance with the specifications, defendant no.1 is not entitled to any amount. It has been further contended that the defendant no.1 though served is not representing in the present matter and therefore it should be assumed that there has been fraud committed by defendant no.1 in supplying sub- standard material to the plaintiffs herein. It has been thus contended that there has been fraud in the transaction and a case of exception to the general rule that the court should not restrain the payment under the Letter of Credit has been carved out and the case of the plaintiffs falls in the said exception of a fraud. Thus,

plaintiffs submits that defendant no.2 should be restrained from honouring this commitment in respect of the said Letter of Credit.

9. The next contention advanced by the learned counsel for the plaintiffs is that even assuming that no case of fraud is made out still it is an admitted position that the documents submitted by the defendants are having material discrepancies to the terms and conditions of the Letter of Credit which has been opened. He has pointed out that the documents pertaining to certification of the goods and its specifications as also the Analysis Report attached to the said documents do not conform with the requirement of the plaintiffs as per the indent and thus, the defendant no.2 has refused to honour the said Letter of Credit because there are various discrepancies in the said documents. The discrepancies are set out by the plaintiffs in para 13A of the said plaint. Discrepancies which are sought to be agitated are by and large in respect of the specifications of the goods and certification thereof.

10. On the other hand the learned counsel for defendant no.2 has contended that as far as defendant no.2 is concerned, it is a bank and it is dealing with international transaction. It has been contended by the learned counsel that defendant no.2 is bound to comply with the commitment which has been given under irrevocable letter of Credit. It has been further contended that for the purpose of establishing confidence in the Commerce and Trade, it is in the interest of Justice that the Letter of Credit issued by the defendant no.2 should be permitted to be honoured and cannot be injuncted otherwise confidence of the public at large would be likely be shakened. He has further contended that it is well settled law that save and except serious case of fraud or irretrievable injustice, the Letter of Credit cannot be stopped from being honoured. The learned counsel for defendant no.2 has further contended that the law as far as bank guarantee and letter of credit are concerned is similar and normally the court will not issue injunction restraining any bank from honouring its commitment under the Letter of Credit. It has been further contended that if

the payment is not made by the defendant no.2 there is all likelihood that foreign banks will not have trust and confidence in the commitment of the defendant no.2 which would in the larger interest shake up the confidence of the people in the economics and trade.

11. It has been further contended that the so-called case of discrepancy of the documents are concerned the plaintiffs are not entitled to urge the same before the court. It is because the plaintiffs by giving an undertaking on 13.12.02 has given up any claim for raising such an objection in respect of discrepancy in the said documents. By the said undertaking in fact the plaintiffs have given an unequivocal undertaking to make payment to the defendant no.2 irrespective of any discrepancies found in the said Letter of Credit. It has been contended by the learned counsel for defendant no.2 that the plaintiffs were aware while executing the undertaking on 13.12.02 that the documents are yet not arrived. On goods having been arrived plaintiffs were eager to release the said goods and without waiting for the said

documents to be received the plaintiffs insisted to defendant no.2 to issue the deliver order without verifying the documents for its discrepancies. Defendant no.2 thus issued delivery order only after plaintiffs gave an undertaking that the defendant no.2 must make payment irrespective of the fact that there are discrepancies in the documents or otherwise. It is contended by the learned counsel for the defendant no.2 that having given such an undertaking it is not open for the plaintiffs to resile therefrom and now contend that the documents which were subsequently received are having discrepancies and therefore plaintiff must reject the same and should not make payment. It has been further submitted that the contention of the plaintiffs that at the time of giving an undertaking plaintiffs were not aware of likely discrepancy in the documents since the documents were yet to arive and therefore undertaking is not binding upon the plaintiffs, has no merits because plaintiffs has not only given an undertaking to pay to defendant no.2 but has clearly given an undertaking to pay the amount even if there are discrepancies in the documents which were yet to be

arrived.

12. In the aforesaid circumstances, the learned counsel for the defendant no.2 has submitted that plaintiffs having made out no case for any exception, the plaintiffs' case should be dismissed and both the notices of motions no. 40 of 2003 and 2329 of 2003 be dismissed. It has been submitted that Notice of Motion No.2329 of 2003 has to be dismissed once the court comes to the conclusion that there is no merits in the Notice of Motion No.40 of 2003. It is because the said motion no.2329 of 2003 has been initiated only because there are orders passed by this court granting injunction in Notice of Motion No.40 of 2003. Thus, the learned counsel submits that both the aforesaid motions be dismissed with costs.

13. The learned counsel for the plaintiffs has relied upon Uniform Customs and Practice for Documentary Credits particularly Article 13 and 14 of the same which reads as under:

Article 13

Standard for Examination of Documents

(a) Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.

Documents not stipulated in the Credit will not be examined by banks. If they receive documents, they shall return them to the presenter or pass them on without responsibility.

(b) The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the date of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

(c) If a Credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them.

Article 14

Discrepant Documents and Notice

(a) When the Issuing Bank authorises another bank to pay, incur a deferred payment undertaking, accept Draft(s), or

negotiate against documents which appear on their face to be in compliance with the terms and conditions of the Credit, the Issuing Bank and the Confirming Bank, if any, are bound:

I. To reimburse the Nominated Bank which has paid, incurred a deferred payment undertaking, accepted Draft(s), or negotiated,

II. to take up the documents.

(b). Upon receipt of the documents the Issuing Bank and / or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

(c). If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgment approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13(b).

(d)i. If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.

ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them, to the presenter.

iii. The Issuing Bank and/or Confirming Bank, if any, shall then be entitled to claim from the remitting bank refund, with Interest, or any reimbursement which has been made to that bank.

e. if the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

f. If the remitting bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the Issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained.

14. The learned counsel for the plaintiffs has thereafter relied upon the various authorities to

contend that the plaintiffs are entitled to interim order restraining defendant from making payment under the said Letter of Credit. He has relied upon the Judgment of the U.P.State Sugar Corporation, V. Sumac International Ltd. reported in 1997 1 SCC 568, Judgment of Larsen & Toubro Limited Vs. Maharashtra State Electricity Board and Others reported in 1995-(6SCC) Pg 68, Judgement of Oil and Natural Gas Corporation Ltd. Vs. Sbi, Overseas Branch, Bombay reported in 2000 6 SCC 385 and the Judgment of Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd. and Ors reported in 2001 1 SCC 663. By relying upon the aforesaid Judgments, the learned counsel has contended that fraud and irretrievable injustice are two grounds on which the court is empowered to grant injunction in respect of bank guarantee or Letter of Credit. It has been contended that by supplying the material of substandard nature the defendant no.1 has committed fraud on the plaintiffs and thus, the said transaction of Letter of Credit is vitiated by fraud and plaintiffs are not liable to honour the same. Nor defendant no.2 is entitled to honour the same. In my opinion, the aforesaid contentions are

totally erroneous.

15. It has been now well settled by various judgments of the Apex Court and this court that transaction of import of the goods and the transaction of letter of credit are two different and independent transactions. A fraud committed by the supplier of the goods cannot and would not vitiate the transaction of letter of credit and the bank who is a party to the said transaction of Letter of Credit is bound to honour the same. The bank is not a party to the transaction for import of goods which is essentially arrived at by and between the plaintiffs and defendant no.1. Even if assuming that defendant no.1 has supplied sub standard goods then the remedy of the plaintiff is to sue the defendant no.2 for damages but cannot stop the transaction of the letter of Credit which has been entered into by defendant no.2 with the defendant no.3 being two banks who are not parties in respect of transaction of import of the said goods. A transaction of letter of credit between defendant no.2 and 3 is an independent transaction to the underlined transaction of the import of the

goods. It has been now held by the Apex Court that the fraud in underlined transaction would not vitiate the transaction of the bank guarantee and / or Letter of Credit. been held that to vitiate such a transaction of bank guarantee and or Letter of Credit what is required is that the said transaction of bank guarantee and / or Letter of Credit itself should be vitiated by a fraudulent conduct of a party. In my opinion, no such case has been made out in the present case. Thus case of the plaintiffs in the present case does not fall in the exception for the purpose of granting relief. I am of the view that once the case of the plaintiffs is not falling under the exception of normal rule as held by the various judgments including the judgments cited hereinabove, no injunction should be granted to stop payment under bank guarantee and or Letter of Credit. I am therefore of the opinion that the plaintiff is entitled to no relief.

16. However, the learned counsel for the plaintiffs has contended that assuming that he does not fall under the exception still plaintiffs are

entitled to injunction it is because bank itself cannot accept the documents once it has been found that they are not in conformity with the Letter of Credit.It has been contended that the bank deals in documents and it is the duty of the bank particularly in view of the Uniform Custom and Practice for Documentary Credits relied upon by plaintiffs hereinabove to scrutinise the documents and reject the documents if found having discrepancy. It has been further contended that the undertaking given by plaintiffs to pay irrespective of the discrepancy in the document is not a valid undertaking because at the time when undertaking was executed documents had yet not arrived and therefore plaintiffs were not aware that there could be any such discrepancy in the documents which are yet to arrive from the defendant no.1.

17. I am also not inclined to accept contention of plaintiffs in respect of aforesaid argument. I am of the opinion that once the plaintiffs have given an undertaking by their letter dt.13.12.03 and gave up right to raise a dispute pertaining to

discrepancy, it is not open for the plaintiffs to thereafter turn around and claim that the undertaking was given prior to arrival of the document. In my opinion when the plaintiffs filed an undertaking plaintiffs were well aware that there can be a possibility that the documents may have a discrepancy but inspite of the same they have given clear undertaking that they will pay and not raise any issue about the documents. In that view of the matter, the contention of the learned counsel for the plaintiffs that in the light of discrepancy found in the documents which are subsequently arrived at, plaintiffs must be exonerated from making payment under the said Letter of Credit and that the plaintiffs must be granted injunction restraining the defendant no.2 from honouring its payment, cannot be accepted. I am of the opinion that the plaintiffs has not made out any case for grant of any interim relief for injuncting restraining the defendant no.2 from making any payment under the said Letter of Credit and ultimately debiting the account of the plaintiffs herein.

18. I am of the further opinion that subsequent motion taken out is also liable to be rejected because that has been taken out only in view of an ad interim order passed restraining the defendant no.2 from debiting the account of the plaintiffs for the sum of Rs.7,000/- p.m. towards keeping the said Letter of Credit alive as also restraining from continuing the lien on the fixed deposit. For the view I have taken in Notice of Motion No.40 in my opinion also would conclude a controversy in Notice of Motion No.2329 of 2003.

19. In view thereof, both the motions are dismissed. However,there shall be no order as to costs. The learned counsel for the plaintiffs has thereafter sought a stay of this order and continuation of ad interim order passed on 30.12.02 as continued by order dt.7.1.03 be continued for further period of 4 weeks. I am inclined to grant the said stay though I have dismissed both the motions. I continue the ad interim order dt.30.12.03 for a period of 4 weeks to enable the plaintiffs to prefer an appeal. Both the motions dismissed accordingly. However, there shall be no

order as to costs.